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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. JAZMIN MONTANEZ et al., Defendants and Appellants.	B281120 (Los Angeles County Super. Ct. No. BA425236)

APPEAL from a judgment of the Superior Court of Los Angeles County, Gary J. Ferrari, Judge. Affirmed in part, reversed in part, and remanded.

Laura S. Kelly, under appointment by the Court of Appeal, for Defendant and Appellant Jazmin Montanez.

Robert Franklin Howell, under appointment by the Court of Appeal; Matthew Alger, under appointment by the Court of Appeal, for Defendant and Appellant Anthony Paz.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant

Attorney General, Margaret E. Maxwell, Supervising Deputy Attorney General, Yun K. Lee, Deputy Attorney General, for Plaintiff and Respondent.

Tom Taylor was bludgeoned to death with a metal rod in the motor home where he lived with defendants and appellants Jazmin Montanez and Anthony Paz. That motor home—which was set on fire with Taylor's dead body inside—was regularly used as a place to smoke methamphetamine by Taylor, defendants, and others, including David Romero, Alfredo De La Torre, and Diana Sequen. Defendants argue key incriminating evidence was wrongly admitted at trial, and defendant Paz argues the trial court incorrectly sustained objections to certain cross-examination questions. Defendants also argue the jury should have been instructed on how to evaluate testimony from De La Torre and Romero, both of whom were present for at least part of Taylor's beating, as well as on a lesser included offense and principles of aiding and abetting. And defendant Paz contends the prosecution misdescribed reasonable doubt during voir dire. We principally consider whether defendants' convictions must be reversed for these asserted errors.

I

A great deal of the evidence against defendants at trial came from the mouths of De La Torre and Romero. De La Torre testified, when called as a witness by the prosecution, to defendants' incriminating statements and conduct. Romero professed to have a hazy memory when he testified, but he was impeached with his own prior statements during a recorded police interview that the jury could consider as substantive evidence. (Evid. Code, § 1235; *Jogani v. Jogani* (2006) 141 Cal.App.4th 158, 174-175.) There was also evidence of guilt that was independent and in some respects corroborative of De La Torre and Romero's accounts, including admissions defendant

Paz made in a recorded statement to a jailhouse cellmate who was actually an informant working for the police; a metal rod identified as the murder weapon that was recovered from a river; and a witness who testified to a motive for the murder, namely, defendant Montanez's ire upon learning Taylor no longer wanted her living at the motor home.

A

Jose Cruz was acquainted with Taylor because Cruz would use methamphetamine at Taylor's motor home and because Cruz's mother was dating Taylor. Cruz was a claimed member of the Eastside Longo street gang, and Cruz knew defendants from the time he spent at the motor home using drugs while defendants were present doing the same.

A day or two before Taylor's murder, Cruz was present at the motor home with a group of people including defendants. By this time, Taylor had come to Cruz and solicited his help in getting everyone to stop coming to the motor home to use drugs, a practice that left Taylor "fed up" that he had no space for himself and not enough opportunities for private time with Cruz's mother. Cruz told defendants and the others present they "got to stop this" (i.e., hanging out at the motor home all the time) because his mother and Taylor needed more time alone.

Defendant Montanez did not react well to Cruz's admonition. She got "mad" and told Cruz the motor home was "her place" and "she was the one putting the rules over [t]here." Montanez "made some phone calls" and "tried to regulate [Cruz] by . . . sending one of the homies . . . ." This irritated Cruz, and he departed to bring back a "female friend" (also an Eastside

Longo gang member) to talk to defendant Montanez because Cruz did not want to get involved, as a man, in a fight with a woman.

When Cruz and his friend returned to the motor home, it was the "same routine," "[s]ame problem." Cruz and his friend told defendant Montanez, defendant Paz, and the others present that they needed to leave and should not congregate there anymore. But everyone remained and it was Cruz who left.

B

A couple days later, Long Beach police officers on patrol in the area of 17th Street smelled smoke. They followed the smell and saw a burning motor home in an alley. The officers called for fire department assistance, and although there was smoke coming out of the motor home's windows, the officers were able to make entry and put out a small fire with a fire extinguisher before the firefighters arrived.

When fully safe to enter the motor home, police and fire personnel discovered a dead body—Taylor's body—inside. Taylor's hands were tied behind his back, there was a gag in his mouth, and there was a towel or blanket of some sort over his head. A fire department investigator concluded the motor home fire was intentionally set.

An autopsy later revealed the cause of Taylor's death was blunt force head trauma, specifically multiple skull fractures, a fracture of the jaw and right cheek bone, brain hemorrhaging, and lacerations to the back of the head that were consistent with having been inflicted by repeated blows from a metal rod. Taylor was also found to have suffered a fracture of the right ribs. Taylor's head injuries would have been rapidly fatal (meaning

between a few minutes and one hour), and the autopsy confirmed he was dead before the fire was set.

Police investigation following the discovery of Taylor's body led to the arrest of defendants Montanez and Paz for his murder. The police also arrested for murder other individuals who were determined to have been present at the motor home on the day of Taylor's death: the aforementioned De La Torre, Romero, and Sequen, plus another man named Jose Zolorza.

Ultimately, De La Torre was never charged with a crime. Romero and Sequen agreed to plea deals on lesser charges that resulted in eight-year prison sentences for each. Both defendants went to trial on a charge of murder; defendant Paz was also tried on a charge of arson (Pen. Code, § 451, subd. (b)).[1]

C

De La Torre testified during the prosecution's case-in-chief. He admitted he was present at the motor home on the day Taylor was killed, although he maintained he never actually went inside the motor home that day. De La Torre also admitted that he was a gang member and a heavy methamphetamine addict at the time, and he acknowledged he used methamphetamine and was "high" on the day Taylor was killed. De La Torre further conceded on cross-examination that he was a suspect in the murder when he was arrested and interviewed by the police, that the police told him he would be "booked" for murder, and that he

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[1] Defendant Paz faced a third charge of attempted cruelty to an animal (there was a dog locked in the motor home with Taylor when it was set it on fire). He pled no contest to the charge at the start of trial, before opening statements.

cried during the police interview because he was "nervous of being charged with homicide." As we will discuss *post*, the trial court sustained a relevance objection when De La Torre was asked whether the police told him he would be charged with murder unless he "gave them the information they [we]re seeking."

Asked to describe the events on the day of the killing, De La Torre testified Sequen called him on January 27, 2014, and told him to come over to the motor home; he described hearing a "commotion" or "bickering" in the background during the phone call. When De La Torre arrived at the motor home (where he went roughly twice a week to smoke methamphetamine), the door was partially open and he could see defendants (who he knew from prior visits), Taylor, and Sequen inside. De La Torre also saw Romero and Zolorza at the motor home.

De La Torre saw Taylor "being restrained and held down against his will." Defendant Montanez slapped Taylor three times in the face and De La Torre heard Taylor moaning in pain in response. De La Torre saw defendant Montanez put a sock in Taylor's mouth and heard defendant Montanez telling the others inside to "tie him, tie him." Defendant Paz helped tie Taylor up. De La Torre heard defendant Montanez say, "I want this mother fucker dead" and "I am done and I'm going to finish this mother fucker."

After witnessing these events over the course of roughly 20 to 30 minutes, De La Torre left because he "didn't want to be part of that"; Romero left with him. When De La Torre left, he still heard Taylor "making . . . sounds." About an hour and a half later, De La Torre returned to the motor home to smoke more methamphetamine. Everything was quiet, De La Torre knocked

on the door, and defendant Paz came out and gave him a methamphetamine pipe; De La Torre could not see inside the motor home when defendant Paz handed over the pipe. De La Torre stayed outside the motor home smoking for about five minutes, and then left. He returned to the motor home a third time after that, again to use drugs. On the third occasion, De La Torre did not see or hear anything.

The next day, Sequen told De La Torre that Taylor had been murdered and the motor home burned. Sometime after that, De La Torre ran into defendant Paz at another house frequented by various people to smoke methamphetamine. Defendant Paz told De La Torre he had killed Taylor with hits to his head and had set the motor home on fire thereafter.[2] As to the manner of death, defendant Paz told De La Torre he (Paz) swung something at Taylor's head—demonstrating a one-handed downward motion—and then tossed what De La Torre understood to be some sort of "stick" into the river.[3]

D

Romero testified as a witness for both the prosecution and the defense. When testifying during the prosecution's case, he acknowledged that he had been "associated" with the Westside

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[2] De La Torre stated he did not remember certain details about defendant Paz's admissions, including some of the precise words defendant Paz used. As to some of these details, De La Torre was impeached or had his memory refreshed with the transcript of his recorded police interview.

[3] De La Torre testified the Los Angeles River was close to the alley where the motor home had been parked.

Longo street gang, that he was at Taylor's motor home on the day he was killed, and that he (Romero) saw defendant Montanez, defendant Paz, Zolorza, and Taylor there too; he denied seeing De La Torre there. Romero denied hearing anyone at the motor home arguing, and he claimed to remember little else (or denied having previously said certain things) when the prosecution asked a slew of questions that tracked Romero's answers to questions during an earlier recorded interview with police detectives.

Romero told the jury he did not remember "a lot of this" because he was under the influence of drugs. He also agreed when asked whether he believed he could get beat up or even killed in prison for testifying as a witness. Predicated on Romero's repeated asserted failures of memory, the prosecution played the entirety of his recorded police interrogation for the jury.

During the recorded interview, Romero relayed a rather comprehensive account of the events on the day of Taylor's death. He admitted De La Torre was present at the motor home that day, with defendants and the others.[4] Romero claimed that when he first arrived, defendant Montanez and Taylor were arguing and defendant Montanez was "blaming him for all kinds of crap[, l]ike sexual harassment and grabbing her when she didn't want to." The argument escalated, Romero walked inside the motor home, and he heard defendant Montanez say, "He needs to die." According to Romero, defendant Montanez was standing in front of Taylor holding a knife when she made this statement.

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[4] Romero confirmed De La Torre never went inside the motor home.

A physical attack on Taylor ensued. Romero saw Defendant Paz "on top [of Taylor] socking the fuck out of him" in "[m]aybe like his stomach." Defendant Montanez grabbed "like a piece of bar," which was "grayish" and "maybe . . . fourteen, fifteen inches." According to Romero, Defendant Montanez used it to "whack[ ]" Taylor "[s]omewhere behind his head" while "homeboy was hitting [Taylor] in the stomach." Zolorza was helping to hold Taylor while defendants were hitting him.

Romero told the police that defendant Montanez ordered him to "tie [Taylor's] mouth" and Romero complied—feeling threatened by defendant Montanez[5]—by tying a rope around Taylor's mouth after defendant Montanez put a sock in it. By that point, Taylor was already "pretty bloody" but he was still moving around. Romero claimed he left with De La Torre and went back home after helping to gag Taylor.

Sometime later, according to Romero, defendant Montanez arrived at his house asking him to give her a ride back to the motor home because she said she wanted to get "her stuff." Romero declined, but defendant Montanez remained outside his house using her phone. Defendant Montanez told Romero she was talking to defendant Paz.

Romero overheard defendants discussing "what should we do with . . . [Taylor]" and defendant Montanez "telling him [i.e.,

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[5] Romero told the detectives defendant Montanez had previously said she had "people in the inside" and "could tell someone to do a hit on somebody," which he understood to be a claim that she was a "shot caller" and had ties to the Mexican Mafia (the "Eme"). Romero also reiterated his statement that defendant Montanez was holding a knife.

defendant Paz] to, you know, basically get rid of him." Romero recalled defendant Montanez saying "something about . . . light the cake" or "turn the candles of the cake on," to signify an order to light the motor home on fire. Romero believed defendant Montanez also used the phrase "cut the cake" on the call with defendant Paz, which he understood to mean "to get rid of that person." About an hour later, defendant Montanez told Romero that defendant Paz called and said Taylor was dead.

Defendant Paz recalled Romero to testify during his defense case. Under defense questioning, Romero agreed he had accepted a plea deal for eight years in prison to avoid getting convicted for murder. Romero conceded his methamphetamine use affected the quality of his memory. And the defense also elicited testimony from Romero that, as a general matter, jail or prison inmates will lie to each other for their own safety or to look tough.[6]

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[6] Sequen also testified during the defense case, as a witness for defendant Montanez. She conceded she was "good friends" with defendant Montanez and was using methamphetamine at the time of Taylor's death. Sequen admitted she was present at the motor home and "socked" Taylor and hit him with "a stick." (She answered "no" when asked if she knew what kind of "stick" it was.) Sequen confirmed defendants were also present, as were Romero, Zolorza, and De La Torre, who was "outside." Sequen testified she did not see either defendant Montanez or defendant Paz hit Taylor but she could not remember various details of what others present did or did not do to Taylor.

E

A key part of the prosecution's case at trial was a recorded conversation defendant Paz had with a jail cellmate shortly after his arrest for murdering Taylor. Unbeknownst to defendant Paz at the time, the cellmate (identified in the record only by the last name Lopez) was an individual "cooperating with law enforcement." A police detective authenticated one of the voices on the recording as defendant Paz's voice, and the prosecution therefore had no need to call inmate Lopez as a witness to establish a foundation for the recording.

1

During evidence admissibility discussions held outside the presence of the jury, defendant Montanez argued the jury should not be permitted to consider defendant Paz's recorded conversation as evidence against her because it was hearsay (as to her) and she had no ability to question defendant Paz regarding the out-of-court admissions he made to inmate Lopez, some of which incriminated her. Defendant Paz, for his part, objected to playing the full recording for the jury because it included statements he made concerning the commission of other bad acts apart from the charged crimes involving Taylor.

The prosecution argued the jailhouse conversation was admissible against both defendants under "the *Greenberger* line of cases"[7] as a statement against penal interest. The prosecution further asked the court to "sanitize the conditions of it," meaning prohibit the defense from making any reference to inmate Lopez's

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[7] The prosecution was referring to *People v. Greenberger* (1997) 58 Cal.App.4th 298 (*Greenberger*), which we discuss *post*.

status as a government cooperator. Defendant Paz opposed the "sanitization" request, arguing inmate Lopez's status as a cooperator was relevant because Lopez was "trying to elicit information gathering" and defendant Paz was "trying to not only cooperate with this person but also trying to boast and brag and puff."

The trial court agreed to the prosecution's request to "sanitize" the conditions of the jail recording, ruling it was "absolutely irrelevant that the person [defendant Paz was] speaking to . . . was an agent [for law enforcement]." As to the request to admit the full jail statement against both defendants, the trial court agreed it was "a *Greenberger* issue" and provisionally overruled defendant Montanez's objection to the statement while stating it would give her attorney "another chance" to argue the issue later. When that time came, the trial court adhered to its prior ruling overruling the objection and noted, "If I'm wrong, the appellate court will tell me I'm wrong."

2

The prosecution played the full 45-minute-plus recording of defendant Paz's conversation with inmate Lopez during its case-in-chief. The jury heard defendant Paz's incriminating admissions concerning his participation in Taylor's murder as well as his statements regarding a woman he referred to as the "main hina," which obviously referred to defendant Montanez, as the prosecution itself would later argue during summation.

Shortly after defendant Paz was placed in the jail cell with Lopez, Lopez asked if defendant Paz had been to "the joint" already and defendant Paz said yes, adding "fucking right now, they're trying to charge me shit for murder." Lopez asked

defendant Paz if "[t]hey got you" and defendant Paz responded, "Nada, fool. No evidence," but conceded "the only shit[,] the guys, fucking I live with them." Defendant Paz told Lopez he was the only person "in here," which prompted Lopez to ask why he had been arrested if, as defendant Paz claimed, he "didn't leave no evidence." Defendant Paz responded, "I didn't. That's 'cause the thing is that there's me and the hina fool who live with the old man."

Conversation continued about "the hina" and defendant Paz explained there were "two hinas," one who "didn't say shit" and another who supposedly "snitched." The following exchange ensued:

[Defendant Paz:] Cause the hina, the main hina . . .

[Lopez:] She's the one fucking pressing the issue?

[Defendant Paz:] Nah, she was the one that started it all.

[Lopez:] Oh, is that right?

[Defendant Paz:] I just end up . . .

[Lopez:] Finishing it.

[Defendant Paz:] Yeah, cleaning.

[Lopez:] Oh, you had to clean up her mess?

[Defendant Paz:] No. I ended up finishing and cleaning her mess.

[Lopez:] Fuck a bitch.

[Defendant Paz:] She's an older cat, fool.

After this exchange, the conversation came back to a woman defendant Paz described as the one who "lived right there too," adding "[w]e both lived right there with the old man" and were "smoking shit." Defendant Paz told Lopez the woman was "from Longo" and when Lopez asked if "she be calling shots,"

defendant Paz responded, "Big time."[8] Lopez asked defendant Paz, "[I]f she told you what to do, you got to do it?" Defendant Paz responded, "Me personally, me, yeah. Me 'cause like either it's me or them, fool."

The conversation then turned in greater detail to the murder charge defendant Paz was facing. Defendant Paz told Lopez "it came on the news," adding "Magnolia and 17th, murder, de-de-de-de. House on fire, they're trying to burn him." Lopez asked defendant Paz whether the fire was started with gas and defendant Paz responded "[p]ropane." Lopez told defendant Paz, "Damn yeah, you're probably straight then" and defendant Paz said, "That's why I'm not sweating it fool." When Lopez asked whether the "whole thing burn[ed]," defendant Paz answered, "Nah."[9]

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[8] Though defendant Paz does not refer to the woman by name, this discussion regarding "calling shots" is immediately preceded by discussion of "the older cat's boyfriend," which ties back to defendant Paz's earlier reference to the "main hina" as "an older cat."

[9] At another point during the conversation, Lopez asked defendant Paz if he knew "what that hina's statements are" and defendant Paz said he hadn't contacted "my homie since . . . [defendant Paz] went into the hole." Immediately thereafter, the following exchange ensued: "[Lopez:] Was she standing next to you when . . . [¶] [Defendant Paz:] Nah. We had separate, separate rooms and shit. [¶] [Lopez:] Nah, like, like, when you guys set that shit on fire, was she there? [¶] [Defendant Paz:] Hmm? [¶] [Lopez:] Was she with you? [¶] [Defendant Paz:] Yeah."

Defendant Paz told Lopez that the police "found the old man burned to death fucking inside his home" and "took everything for evidence."[10] Lopez asked if "he" (i.e., "the old man") tried to fight back, which prompted the following exchange:

[Defendant Paz:] Mm-hmm.

[Lopez:] Yeah? He had hands, huh? Old-ass man had hand[s]?

[Defendant Paz:] ([unintelligible])

[Lopez:] Let me find out that fool beat you up.

[Defendant Paz:] Nah, ([unintelligible]) fool. ([unintelligible]) big.

[Lopez:] Like a pipe?

[Defendant Paz:] Heavy, boom, boom.

[Lopez:] Yeah, right. Yeah, that's crazy. That's a crazy way. Up, close, and personal.

[Defendant Paz:] Yeah, yeah.

[Lopez:] Straight up.

[Defendant Paz:] More artistic.

[Lopez:] You living out your fantasies? That's crazy. That's, that's fucking, that's pretty . . . vicious. It's a vicious cycle.

[Defendant Paz:] It's not a vicious cycle. It's art. It was art, beautiful. It's beautiful.

After a police detective came to visit defendant Paz in his jail cell and told him (falsely, in the hope of prompting further

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[10] At a later point in the conversation, defendant Paz used the name "Tom" when referring to the "old man" with whom he was staying.

incriminating statements) that the police had obtained, among other things, video and DNA evidence, defendant Paz and Lopez returned to discussing the evidence the police might have on defendant Paz (once the detective left, of course). Lopez said to defendant Paz, "I thought you got rid of everything, fool." Defendant Paz responded, "I did ([unintelligible]) I threw it on the ocean . . . right, all the sand and shit, but the person that was with me, he was holding it."[11]

In addition to making statements relevant to Taylor's murder during the jail conversation with Lopez, Defendant Paz made statements concerning certain other bad acts he claimed to have committed or claimed he would commit. He described getting in a fight in prison in which a person he and two other inmates attacked ended up "covered in all red" from a "[n]osebleed, busted." He responded "[s]oon as I get out" when Lopez asked whether he would be "taking care of snitches." And he implied there might be an outstanding warrant for his arrest for drug sales in the amount of "kilos, pounds, fool." There was no other evidence at trial that suggested defendant Paz had actually committed any of these acts.

F

Beyond defendant Paz's jail statement and Cruz's testimony regarding a possible motive, there was one additional

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[11] Defendant Paz told Lopez that the police were "saying that it was me and [Cruz]" but defendant Paz said "Cruz was never there" and "there was some other homeboy." The prosecution contended in closing argument that the "other homeboy" was Zolorza.

significant piece of evidence to corroborate De La Torre and Romero's testimony: the recovery of a metal rod consistent with their description of what was believed to be the murder weapon. One of the investigating police detectives who testified at trial told the jury she and a police dive team took Zolorza (who was then in custody) to the Los Angeles River in response to information he provided during a police interrogation. Zolorza identified a particular location and the dive team later recovered a metal rod from the river (which was admitted as an exhibit at trial). Romero, during another recorded interview with the police, identified a picture of the rod as "the bar that [defendant Montanez] was using to hit [Taylor] in the head."

G

During closing argument, the prosecution argued defendant Paz was Taylor's actual killer and defendant Montanez was liable for the murder as an aider and abettor. After retiring to deliberate, the jury sent out two requests. The first was for a readback of Romero's "testimony regarding his conversation with [defendant Paz]," which the trial court granted. The second was for "the transcript of the conversation between [d]efendant Paz [and] the other guy in the jail," and the parties stipulated the transcript could go back to the jury.

The jury later advised the court and parties it had reached a verdict as to defendant Montanez but not defendant Paz. The trial court took the completed verdict, and on the sole count of the indictment against her for murder, the jury found defendant Montanez guilty of first degree murder. The trial court asked the jury to continue its deliberations regarding defendant Paz. The following (court) day, the jury found defendant Paz guilty of

second (not first) degree murder and announced it was hung on the arson charge in count two. The court declared a mistrial on that count and later dismissed it without objection from the prosecution.

The trial court sentenced defendant Montanez to 25 years to life in prison for first degree murder. On his conviction for second degree murder, defendant Paz received a 15-years-to-life sentence. The court also imposed a concurrent 16-month sentence for the attempted cruelty to an animal charge to which defendant Paz pled no contest.

II

The law requires divergent dispositions of defendants' appeals.[12] As to defendant Montanez, the cumulative effect of two

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[12] Each defendant purports to join in arguments made by the other. The one-sentence joinders included in the principal briefs of each defendant are improper and we disregard them. (*People v. Bryant, Smith and Wheeler* (2014) 60 Cal.4th 335, 363 ["Appellate counsel for the party purporting to join some or all of the claims raised by another are obligated to thoughtfully assess whether such joinder is proper as to the specific claims and, if necessary, to provide particularized argument in support of his or her client's ability to seek relief on that ground"] (*Bryant*); *People v. Nero* (2010) 181 Cal.App.4th 504, 510, fn. 11 ["Joinder may be broadly permitted (Cal. Rules of Court, rule 8.200(a)(5)), but each appellant has the burden of demonstrating error and prejudice . . ."].) After filing an opening brief, a reply brief, and her own supplemental brief, defendant Montanez then filed a request to join in arguments made by defendant Paz in a supplemental brief this court permitted him to file once learning his prior attorney on appeal had been disqualified from the

critical errors compels reversal of her conviction. In seeking to admit defendant Paz's jail conversation against defendant Montanez, the prosecution never cited, and the trial court never considered, our Supreme Court's recent guidance on the declarations against interest hearsay exception, *People v. Grimes* (2016) 1 Cal.5th 698 (*Grimes*).[13] Under *Grimes* and related binding authority, defendant Paz's admissions during that conversation were wrongly admitted as evidence (indeed, unimpeachable evidence) against defendant Montanez. In addition, the trial court did not instruct the jury on how it must evaluate accomplice testimony even though there was evidence on which the jury could find at least Romero had been an accomplice to Taylor's murder. Without an instruction to consider the testimony of accomplices with caution and to ensure such testimony is corroborated, and having been erroneously allowed to rely on the recorded jail statement that provided key corroborative evidence of guilt, we lack the requisite confidence in the jury's verdict as to defendant Montanez.

Defendant Paz's various arguments for reversal, however, are another matter. His argument that the prosecutor mischaracterized the beyond a reasonable doubt standard during jury voir dire is forfeited and meritless. His complaints about the ruling admitting in evidence his recorded jail statement either lack merit or obviously would not have influenced the jury's verdict. The missing accomplice instructions did not prejudice

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practice of law. This court denied defendant Montanez's belated request to raise additional issues via joinder.

[13] The Supreme Court decided *Grimes* just two months before defendants' trial.

defendant Paz in light of his own highly incriminating admissions the jury heard in that jail statement. He was not entitled to a lesser included offense instruction on voluntary manslaughter because there was no substantial evidence (indeed, no evidence period) that *he* acted in a heat of passion triggered by sufficient provocation. And certain evidentiary rulings concerning cross-examination questions posed to De La Torre (viz, whether the police threatened him with murder charges) and one of the investigating detectives (viz, whether two of defendant Paz's statements to inmate Lopez were true) were either within the trial court's discretion or non-prejudicial. We shall therefore affirm his conviction.

A

1

Defendant Montanez advances hearsay and constitutional challenges to the trial court's decision to permit the jury to consider defendant Paz's jail cell admissions as evidence against her. We discuss only the hearsay argument, as we believe she is correct on that ground and it suffices to show the jail cell admissions were incorrectly admitted as evidence against her.

"'Hearsay evidence' is evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated." (Evid. Code, § 1200, subd. (a).) "Except as provided by law, hearsay evidence is inadmissible." (Evid. Code, § 1200, subd. (b).) One of the exceptions to the hearsay rule is for "declarations against interest." (Evid. Code, § 1230.) That exception provides: "Evidence of a statement by a declarant having sufficient knowledge of the subject is not made inadmissible by the hearsay

rule if the declarant is unavailable as a witness and the statement, when made, was so far contrary to the declarant's pecuniary or proprietary interest, or so far subjected him to the risk of civil or criminal liability . . . that a reasonable man in his position would not have made the statement unless he believed it to be true." (Evid. Code, § 1230.)

A question that has frequently arisen in the case law interpreting the declarations against interest exception (and its federal analog) is whether statements of a first co-defendant are properly admissible under this exception against a second co-defendant despite the inability to cross-examine the first defendant. (See, e.g., *Williamson v. United States* (1994) 512 U.S. 594, 598-605 (*Williamson*); *Grimes*, *supra*, 1 Cal.5th at pp. 705-719; *People v. Samuels* (2005) 36 Cal.4th 96, 120-121 (*Samuels*); *People v. Duarte* (2000) 24 Cal.4th 603, 610-619 (*Duarte*); *People v. Leach* (1975) 15 Cal.3d 419, 441 (*Leach*); *People v. Arauz* (2012) 210 Cal.App.4th 1394, 1400-1401 (*Arauz*); *Greenberger*, *supra*, 58 Cal.App.4th at pp. 327-341.) We shall review the pertinent cases and apply the controlling principles that emerge to the use of defendant Paz's jail statement against defendant Montanez. Our review of the trial court's decision to permit such use is for abuse of discretion. (*People v. Lawley* (2002) 27 Cal.4th 102, 153.)

One of the earliest discussions of the issue under consideration is found in *Leach*. The defendants in that case were charged with murder, and suffice it to say for our purposes that certain of the defendants made incriminating statements to either a prison cellmate or an undercover sheriff's deputy that implicated not only themselves in the crime but also one or more of the non-testifying co-defendants. (*Leach*, *supra*, 15 Cal.3d at pp. 425-426.) The *Leach* court recognized that the assertion of

the privilege against self-incrimination satisfied the unavailability requirement of the declaration against interest exception. (*Id.* at p. 438.) But our Supreme Court held it was error to admit those portions of the out-of-court statements that implicated the non-testifying co-defendants because the declaration against interest exception does not permit the admission of "any statement or portion of a statement not itself specifically disserving to the interests of the declarant."[14] (*Id.* at p. 441.)

The United States Supreme Court later opined on the scope of the federal hearsay exception for declarations against interest in *Williamson*, *supra*, 512 U.S. 594. In that case, one Harris admitted to a Drug Enforcement Administration (DEA) agent that he was transporting cocaine belonging to another, Williamson. (*Id.* at pp. 596-597.) When Harris refused to testify at Williamson's trial, the DEA agent was allowed to testify to the out-of-court statements Harris made to him. (*Id.* at p. 597.)

The high court held this was reversible error. (*Williamson*, *supra*, 512 U.S. at p. 604.) With parallels to the reasoning in *Leach*, the high court explained the federal declarations against interest exception was "founded on the commonsense notion that

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[14] The *Leach* opinion further noted its holding was consistent with the constitutional right of confrontation and "at least implicit in *People v. Aranda* (1965) 63 Cal.2d 518[ ]," which "held . . . that in a joint trial evidence of a self-incriminating extrajudicial statement by one defendant, although competent against the declarant, is nevertheless inadmissible at trial if it includes any language implicating a codefendant which cannot be 'effectively deleted without prejudice to the declarant.'" (*Lynch*, *supra*, 15 Cal.3d at p. 441, fn. 17.)

reasonable people, even reasonable people who are not especially honest, tend not to make self-inculpatory statements unless they believe them to be true," but "[t]he fact that a person is making a broadly self-inculpatory confession does not make more credible the confession's non-self-inculpatory parts." (*Id.* at p. 599.) The *Williamson* court explained "when part of the confession is actually self-exculpatory, the generalization on which [the hearsay exception] is founded becomes even less applicable" because "[s]elf-exculpatory statements are exactly the ones which people are most likely to make even when they are false; and mere proximity to other, self-inculpatory, statements does not increase the plausibility of the self-exculpatory statements." (*Id.* at p. 600.) The Court allowed for the possibility that *some* of Harris's statements might be admissible, but reversed and remanded for the Court of Appeals to determine whether each of the statements in Harris's confession was "truly self-inculpatory," which the court acknowledged "can be a fact-intensive inquiry . . . [requiring] careful examination of all the circumstances surrounding the criminal activity involved . . . ." (*Id.* at p. 604.)

Three years after *Williamson*, in the *Greenberger* decision the trial court here relied on, the Court of Appeal for this district recognized the extent of the hearsay exception for declarations against interest was defined in *Leach*, which the *Greenberger* court understood to hold that "[o]nly those statements or portions of statements that are specifically disserving of the penal interest of the declarant . . . [are] sufficiently trustworthy to be admissible"—as contrasted with "'collateral' statements" that are not. (*Greenberger*, *supra*, 58 Cal.App.4th at p. 328.) The Court of Appeal believed there was "no litmus test for the determination

of whether a statement is trustworthy," but the "least reliable circumstance is one in which the declarant has been arrested and attempts to improve his situation with the police by deflecting criminal responsibility onto others" whereas the "most reliable circumstance is one in which the conversation occurs between friends in a noncoercive setting that fosters uninhibited disclosures." (*Id.* at pp. 334-335.)

Undertaking the "'fact-intensive inquiry'" called for in *Williamson* and employing the abuse of discretion standard of review, the *Greenberger* court held out-of-court statements by certain co-defendants were properly admitted against the other co-defendants. (*Greenberger*, *supra*, 58 Cal.App.4th at pp. 332, 336-341.) Specifically, the Court of Appeal rejected the argument that one Lowe's statements to an acquaintance in a bar should have been excluded when offered against another Mentzer because Lowe initially denied participation in the charged crime and then admitted only that he drove the car used in the crime and had been paid. (*Id.* at pp. 336-337.) The Court of Appeal instead credited the trial court's determination that, in context, Lowe's statements provided sufficient indicia of reliability to be trustworthy because they were "specifically disserving of Lowe's penal interest" in admitting being paid for driving the car and being present at the murder scene. (*Id.* at p. 337.)

The *Greenberger* court also approved admission of out-of-court statements by Mentzer that incriminated co-defendants Marti and Lowe over Marti and Lowe's objections that certain portions of the statements were not specifically disserving of Mentzer's interest. (*Greenberger*, *supra*, 58 Cal.App.4th at pp. 339-341.) The court held the Mentzer statements "were an integral part of the statement in which he implicated himself in

planning and participating in the kidnapping and murder," noting the statements were part of a conversation in which Mentzer said "he was the person who set up the 'whole goddamn thing'" and there did not appear to be "any role shifting or effort to minimize his involvement." (*Id.* at pp. 340-341.)

Another three years after *Greenberger*, our Supreme Court again returned to the scope of the declarations against interest hearsay exception in *Duarte*, *supra*, 24 Cal.4th 603. The facts of *Duarte* involved three defendants charged with conspiracy, shooting at an inhabited dwelling, and assault with a firearm. (*Id.* at p. 607.) One of the defendants, Morris, made a post-arrest statement to the police that "incriminated himself and defendant [Duarte], saying, among other things, that they had realized from news accounts that they had shot at the wrong house." (*Id.* at p. 608.) The trial court permitted a police sergeant to testify to Morris's statement at Duarte's trial and our Supreme Court held this was error. (*Id.* at p. 609.)

The *Duarte* court reasoned that although Morris's post-arrest statement "indisputably contained admissions that appear on their face to be contrary to Morris's interest," "a hearsay statement [that] may be facially inculpatory or neutral cannot always be relied upon to indicate whether it is 'truly self-inculpatory, rather than merely [an] attempt[ ] to shift blame or curry favor.'" (*Id.* at pp. 611-612, citing *Williamson*, *supra*, 512 U.S. at p. 603.) The court concluded portions of Morris's statement were such an attempt because they "positively served" Morris's penal interests rather than "'specifically disserving'" them. (*Duarte*, *supra*, 24 Cal.4th at pp. 612-613 [highlighting, for instance, Morris's statement that he participated in shooting at "'the wrong house,'" which suggested he participated "only *by*

mistake"].) The *Duarte* court acknowledged it is sometimes a sufficient remedy to excise portions of an out-of-court statement that are not disserving, but the court concluded that remedy would be inadequate for Morris's statement because it was generally untrustworthy as a whole in light of its elements attempting to shift blame and curry favor.[15] (*Id.* at pp. 614-615, 618.)

Our Supreme Court reached the opposite result in another declarations against interest case, *Samuels*, *supra*, 36 Cal.4th 96. In that case, the court upheld admission, as declarations against interest, of certain statements made by a non-testifying accomplice, one Bernstein, concerning the victim's murder. (*Id.* at p. 120 [Bernstein admitted "'[h]e had done it'" with help from another and the defendant paid Bernstein for the killing].) The *Samuels* court rejected the argument that Bernstein's statement about being paid by the defendant was "collateral" or an attempt to shift blame. (*Ibid.*) To the contrary, the court concluded "[t]his admission, volunteered to an acquaintance, was specifically disserving to Bernstein's interests in that it intimated he had participated in a contract killing" and "was inextricably tied to

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[15] Dismissing the People's argument that Morris's statements about not wanting to kill or hurt anyone were still disserving because they acknowledged he was involved in the crime, the *Duarte* court observed "such would be true of any attempt to 'shift blame' ([*Williamson*], *supra*, 512 U.S. at p. 603[ ]) without completely denying involvement." (*Duarte*, *supra*, 24 Cal.4th at p. 616.)

and part of a specific statement against penal interest."[16] (*Id.* at p. 121.)

Most recently, our Supreme Court addressed the declaration against interest hearsay exception in *Grimes*, *supra*, 1 Cal.5th 698. There, the court undertook a thorough analysis of many of the cases we have discussed here, although the posture of *Grimes* was distinct—it involved a defendant, not the prosecution, seeking to admit an out-of-court statement as a declaration against interest. (*Id.* at p. 710.) Specifically, the defense argued the trial court erred by admitting a statement made by one Morris (who killed himself after his arrest) confessing he killed the victim while barring the defense from eliciting testimony that Morris contemporaneously said the defendant (Grimes) took no part in the killing. (*Ibid.*) Our Supreme Court agreed and held reversal of the penalty phase verdict of death was required. (*Ibid.*)

In its discussion of the issue, the *Grimes* court emphasized a "contextual approach" is necessary when confronting issues concerning the declarations against interest exception. (*Grimes*, *supra*, 1 Cal.5th at p. 715.) Undertaking such an approach, the *Grimes* court discussed the *Williamson* decision and its further explication by the United States Court of Appeals for the Ninth

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[16] The Court of Appeal for this district later relied in part on *Samuels* to affirm—in *Arauz*, *supra*, 210 Cal.App.4th 1394—the admission of an accomplice's "jailhouse statements" under the declarations against interest hearsay exception. (*Id.* at pp. 1400-1401.) Quoting *Samuels*, the *Arauz* court held the accomplice's "'facially incriminating comments [implicating himself and identifying appellants by their gang monikers] were in no way exculpatory . . . .'" (*Id.* at p. 1401.)

Circuit. (*Id.* at pp. 714-715.) Because this discussion is particularly relevant for our purposes, we quote it at length:

> "In the wake of *Williamson*, the United States Court of Appeals for the Ninth Circuit has considered how the rule applies to a statement in which the declarant both inculpates himself and exculpates another . . . . (*U.S. v. Paguio* (9th Cir. 1997) 114 F.3d 928 (*Paguio*).) In *Paguio*, the court reversed the defendant's conviction on the ground that the trial court abused its discretion by admitting his father's confession that he had falsified certain tax forms, but excluding the portion of the statement that represented that the son "'had nothing to do with it.'" (*Id.* at pp. 934-935.) Writing for the court, Judge Kleinfeld explained that, in context, the latter statement both disserved the father's interests, insofar as 'leading others into wrongdoing has always been seen as especially bad,' and was 'not practically separable' from the remainder of the confession. (*Id.* at p. 934.) The court rejected the government's argument that the rule announced in *Williamson* 'mean[s] that the trial judge must always parse the statement and let in only the inculpatory part.' (*Ibid.*) Rather, '[i]t means that the statement must be examined in context, to see whether as a matter of common sense the portion at issue was against interest and would not have been made by a reasonable person unless he believed it to be true.' (*Ibid.*) 'As a matter of common sense,' the court explained, this is less likely to be true when the

> statement takes the form "'I did it, but X is guiltier than I am,'" than when the statement is "'I did it alone, not with X.' That is because the part of the statement touching on X's participation is an attempt to avoid responsibility or curry favor in the former, but to accept undiluted responsibility in the latter.' (*Ibid.*; see also *U.S. v. Lopez* (10th Cir. 1985) 777 F.2d 543, 554 [trial court erred in excluding hearsay statements of a passenger in a vehicle that he alone had placed cocaine into the vehicle and that the defendant was not aware of the drugs prior to transporting them].)" (*Grimes*, *supra*, 1 Cal.5th at pp. 714-715.)

Later in its *Grimes* opinion, our Supreme Court returned to the same point when providing express guidance on what courts must do when confronted with a question concerning the scope of the declarations against interest hearsay exception: "Ultimately, courts must consider each statement in context in order to answer the ultimate question under Evidence Code section 1230: Whether the statement, even if not independently inculpatory of the declarant, is nevertheless against the declarant's interest, such that 'a reasonable man in [the declarant's] position would not have made the statement unless he believed it to be true.' As the court recognized in *Paguio*, such a statement is more likely to satisfy the against-interest exception when the declarant accepts responsibility and denies or diminishes others' responsibility, as in the example "'I robbed the store alone,'" as opposed to attempting to assign greater blame to others, as in the example, "'I did it, but X is guiltier than I am.'" (*Paguio*, *supra*, 114 F.3d at p. 934.)" (*Grimes*, *supra*, 1 Cal.5th at p. 716.)

The rule we distill from these cases, including the recent opinion in *Grimes*, is that the declaration against interest exception generally does not extend to remarks that seek to shift or assign greater blame to others, minimize, or curry favor—even when made as part of a broader inculpatory statement. (Compare *Grimes*, *supra*, 1 Cal.5th at p. 716; *Duarte*, *supra*, 24 Cal.4th at pp. 614-616 with *Greenberger*, *supra*, 58 Cal.App.4th at p. 341.) Applying that rule here, it was error to permit the jury to use defendant Paz's jail conversation as incriminating evidence against defendant Montanez—without at least redacting two excerpts that are highly incriminating as to defendant Montanez and not disserving of (but rather minimizing and exculpatory) of defendant Paz's penal interest.

In the first of these excerpts, defendant Paz told inmate Lopez (and transitively, the jury) about the "main hina," which, as the prosecution contended during summation, was a reference to defendant Montanez. Defendant Paz said she "was the one that started it all" while he "just end[ed] up [¶] . . . [¶] finishing and cleaning her mess." In the second excerpt, defendant Paz told Lopez an unnamed woman (who again the jury would infer was defendant Montanez) was calling shots "[b]ig time." Lopez asked defendant Paz, "[I]f she told you what to do, you got to do it?" Defendant Paz responded, "Me personally, me, yeah. Me 'cause like either it's me or them, fool."

Individually, and unquestionably in combination, these are post-arrest statements that seek to shift blame and finger defendant Montanez as more culpable for the crime than defendant Paz. Like the statements that warranted reversal in *Duarte*, *supra*, 24 Cal.4th at page 616, it is immaterial that they occurred as part of a broader conversation in which defendant

Paz did not deny involvement in the crime. Indeed, defendant Paz's statements in these two excerpts are quite the opposite of the circumstances in the Court of Appeal case on which the trial court relied, *Greenberger*, where the defendant's out-of-court statement included his admission to have orchestrated the "'whole goddamn thing.'" (*Greenberger*, *supra*, 58 Cal.App.4th at p. 341.) Admitted against defendant Montanez, defendant Paz's jail conversation was accordingly hearsay as to at least these two excerpts, and the jury should not have been permitted to hear them.[17] (*Grimes*, *supra*, 1 Cal.5th at p. 716 [statement more likely to satisfy the declarations against interest exception "when the declarant accepts responsibility and denies or diminishes others' responsibility, as in the example "'I robbed the store alone,'" as opposed to attempting to assign greater blame to others, as in the example, "'I did it, but X is guiltier than I am'"].)

2

The trial court opted to instruct the jury not with California's officially sanctioned pattern instructions, the CALCRIM series, but with the CALJIC set. The court held a conference with counsel to discuss the specific instructions that should be given, and the defense attorneys did not ask the court to instruct the jury with the pertinent CALJIC instructions on accomplice testimony. Defendant Montanez contends on appeal (as does defendant Paz, see *post*) that the failure to give these

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[17] The conversation posed no hearsay problem as to defendant Paz, of course. It constituted a party admission. (Evid. Code, § 1220.)

instructions was error, and we consider the issue on the merits because the obligation to give accomplice testimony instructions arises sua sponte where the evidence would permit the jury to find a witness was an accomplice (or where a witness was an accomplice as a matter of law). (*People v. Guiuan* (1998) 18 Cal.4th 558, 566-567; *People v. Zapien* (1993) 4 Cal.4th 929, 982; see also *People v. Letner and Tobin* (2010) 50 Cal.4th 99, 207.)

There are several CALJIC instructions that tell jurors how to determine whether a witness is an accomplice and, if so, whether and how to consider the accomplice's testimony as evidence of guilt. CALJIC 3.10 defines an accomplice as a "a person who [is] [was] subject to prosecution for the identical offense charged . . . against the defendant on trial by reason of [aiding and abetting] [or] [being a member of a criminal conspiracy]." (CALJIC No. 3.10.) CALJIC No. 3.18 informs jurors they must view accomplice testimony with caution and care to the extent the testimony "tends to incriminate [the] [a] [another] defendant." And CALJIC Nos. 3.11, 3.12, and 3.13 explain jurors may not find a defendant guilty based on the testimony of an accomplice (including an out-of-court statement made by the accomplice) unless "that testimony is corroborated by other evidence which tends to connect [the] [that] defendant with the commission of the offense," which corroboration need not itself establish every element of the crime to be proven but must come from other evidence besides the testimony of another accomplice.

These CALJIC instructions accurately state governing law. (Pen. Code, § 1111 ["A conviction can not be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the

commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof. An accomplice is hereby defined as one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given"]; *Bryant*, *supra*, 60 Cal.4th at p. 430 ["[i]f [the jury] found he was an accomplice, it was required to find corroboration for his testimony, and it should view his testimony with caution," citing CALJIC Nos. 3.11, 3.12, 3.13, 3.18, and 3.19]; *People v. Williams* (2013) 56 Cal.4th 630, 677-678 [CALJIC 3.11 accurately and adequately states the law on accomplice corroboration]; *People v. Williams* (1997) 16 Cal.4th 153, 245-246 [requirement to give accomplice instructions applies to out-of-court statements made by accomplice under police questioning]; see also *People v. Rangel* (2016) 62 Cal.4th 1192, 1222 ["[T]he testimony of one accomplice cannot corroborate that of another accomplice"] (*Rangel*).)

Here, although Romero ultimately accepted a deal to plead guilty to a lesser offense, he was initially indicted by a grand jury for murder. That fact alone is not dispositive of his status as an accomplice. (*People v. Stankewitz* (1990) 51 Cal.3d 72, 90 ["The fact that a witness has been charged or held to answer for the same crimes as the defendant and then has been granted immunity does not necessarily establish that he or she is an accomplice"] (*Stankewitz*); but see *People v. Chavez* (1985) 39 Cal.3d 823, 830 [evidence sufficient to justify accomplice instructions in part because witness was originally charged with murder and robbery and eventually pleaded guilty to being an accessory].) What are dispositive, however, are Romero's own recorded statements during his police interview admitting he was

present inside the motor home at the time of the attack on Taylor, he heard the death threats defendant Montanez conveyed at the time, he saw defendant Paz "socking the fuck out of him," and he took affirmative part in aiding defendants by (at a minimum) tying a gag in Taylor's mouth while Taylor was already "pretty bloody." That is evidence that can readily support a finding of accomplice liability on an aiding and abetting theory. (*Stankewitz*, *supra*, at p. 90 [definition of accomplice in Penal Code section 1111 encompasses all principals to a crime, including aiders and abettors and conspirators].)

The Attorney General resists this conclusion, arguing "there was adequate evidence for the jury to conclude" that Romero was not an accomplice despite participating in restraining Taylor because Romero was not "present when [defendant] Paz killed Taylor with a metal rod, hours after [he] had left the [motor home]." The argument is deficient, and doubly so.

First, the issue is not whether there was adequate evidence to permit the jury to find Romero was not an accomplice; the issue is the trial court never instructed the jury such that it would know it had to make that determination. (*Rangel*, *supra*, 62 Cal.4th at p. 1222 [""Whether someone is an accomplice is ordinarily a question of fact for the jury . . ."""].)

In any event, and second, it is hornbook law that Romero's absence from the scene at the time of Taylor's death is not determinative—as the prosecution itself recognized when it argued in closing that the "[j]ury instruction says, you don't have to be there to be guilty." (See, e.g., CALCRIM No. 334 ["An accomplice does not need to be present when the crime is committed"].) The jury would have been entitled to infer from

Romero's own statements, which the jury could have credited only selectively (CALCRIM No. 226 ["You may believe all, part, or none of any witness's testimony]"), that Romero left the scene of the crime before the moment of death merely in an effort to avoid culpability despite sharing defendants' murderous intent and helping restrain Taylor to aid defendants.

The bottom line is there were sufficient grounds on which the jury could have found Romero was an accomplice, and the trial court erred by not giving the requisite accomplice testimony instructions.[18]

3

Defendant Montanez argues the *Chapman v. California* (1967) 386 U.S. 18 standard applies when evaluating the prejudicial impact of the errors we have identified. (*Id.* at p. 24 [federal constitutional error is not prejudicial only where a court can "declare a belief that it was harmless beyond a reasonable doubt"].) We believe the more permissive *People v. Watson* (1956) 46 Cal.2d 818 (*Watson*) standard applies (*Duarte*, *supra*, 24 Cal.4th at pp. 618-619), but for reasons we shall explain, even under the more permissive *Watson* standard of prejudice, reversal of defendant Montanez's conviction is required.

Considering the erroneously admitted jail conversation first, it was a major piece, arguably the centerpiece, of the prosecution's case at trial. The jury had various reasons to be

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[18] In light of our conclusion as to Romero, and for the reasons we discuss in evaluating prejudice to defendants, we need not reach the question of whether there was sufficient evidence to require accomplice instructions for De La Torre's testimony.

skeptical of testimony from Romero and De La Torre. Less so, however, as to the recorded admissions made by defendant Paz—who was on trial for murder himself and who, unlike both Romero and De La Torre, was not subject to testing by cross-examination. The prosecution emphasized the broad significance of defendant Paz's admissions during closing argument by asserting the jail conversation "is what's going to help you decide if . . . De La Torre and . . . Romero and . . . Cruz are all telling the truth"—adding that the jury "got to hear it directly out of [defendant] Paz's mouth what happened" and noting "the defense is going to have to get up here and try to explain this away." Moreover, among the portions of defendant Paz's jail conversation that the prosecution used to great effect was the excerpt that referenced defendant Montanez as the "'main hina'" who "'started it all.'"

The significance of defendant Paz's jail conversation was apparently not lost on the jury. It made only two requests during deliberations, one of which was for a transcript of that conversation.

Considering, next, the error in failing to give the jury accomplice testimony instructions in reference to Romero, there are two potential sources of prejudice. The first is the absence of an instruction to view his testimony with caution (if the jury found, as we think likely, that he was an accomplice). Our Supreme Court has relied in part on a jury's knowledge that a witness was arrested in connection with the same murder that is the subject of trial to hold the jury would have viewed the witness's testimony with caution even without express instruction to do so. (*People v. Williams* (2010) 49 Cal.4th 405, 456 (*Williams*).) But it bears emphasizing that the conclusion of

no prejudice in that case was only partly for that reason—there were various other facts on which the court also relied that are not equally present here. (*Ibid*. [relying, among other things, on the jurors' knowledge that the witness's testimony was corroborated by the defendant's own statements and that the witness testified under a grant of immunity].)

The second potential source of prejudice is the absence of an instruction that Romero's testimony must be "corroborated by other evidence which tends to connect [the] [that] defendant with the commission of the offense." (CALJIC No. 3.11.) If so instructed, the jury could find some corroboration in De La Torre's testimony that he saw defendant Montanez slap Taylor, threaten to kill him, and place a sock in his mouth (assuming the jury did not find De La Torre was an accomplice) or in Cruz's testimony regarding a possible motive for the crime. But without the unimpeachable evidence provided by defendant Paz's recorded admissions, there would also be various reasons why the jury might have disbelieved the testimony of Romero, including his gang affiliation and methamphetamine use at the time. In addition, no witness other than Romero testified (via impeachment predicated on his prior police interview) to defendant Montanez's use of the metal rod the police later recovered, to the "cut the cake" conversation between defendant Montanez and defendant Paz, and to Romero's belief that defendant Montanez was a "shot caller" with Mexican Mafia ties who "could tell someone to do a hit on somebody."

In the end, we need not assess the individual impact of both of these errors (the admission of defendant Paz's jail conversation and the absence of accomplice instructions regarding Romero) because we are convinced this is an instance where their

cumulative effect resulted in prejudice to defendant Montanez that requires reversal. (See, e.g., *People v. Hill* (1998) 17 Cal.4th 800, 844-845 [conceding the court might conclude any error was harmless standing alone, but reversing on the rationale that "a series of trial errors, though independently harmless, may in some circumstances rise by accretion to the level of reversible and prejudicial error"].) These two errors were, in large part, mutually reinforcing. Defendant Paz's jail conversation reinforced the reliability of Romero's testimony, and Romero's testimony reinforced certain statements made by defendant Paz—particularly those that cast defendant Montanez as the more culpable "shot caller" defendant who "started it all" and who defendant Paz had to obey because "either it's me or them, fool."

Again, the combined effect of these errors that cast defendant Montanez as the more culpable leader of the group was apparently not lost on the jury. In a case with evidence of only one defendant's recorded incriminating admissions—those of defendant Paz—it is telling that the jury first reached a verdict as to defendant Montanez while informing the court it was having difficulty reaching a verdict as to defendant Paz and returning a verdict against him only after further deliberations. Further, considering not just deliberations but the actual verdicts themselves, the impact of the errors we have discussed is at least arguably revealed there too: the jury found defendant Paz guilty of only second degree murder while convicting defendant Montanez of the more serious murder in the first degree.

In short, we believe it is reasonably probable defendant Montanez would have achieved a more favorable result absent the identified errors and we must therefore reverse her conviction. In light of our reversal, and, in any event, our

previously expressed views on the retroactivity of Senate Bill 1437 (*People v. Martinez* (2019) 31 Cal.App.5th 719 (*Martinez*)) to which we adhere, we need not further discuss the issue defendant Montanez raises in supplemental briefing.

B

Defendant Paz's principal brief on appeal makes four arguments for reversal of his conviction: (1) the trial court prejudicially erred in prohibiting his trial attorney from making any reference to inmate Lopez's status as a government cooperator, (2) it was prejudicial error to admit the entirety of his conversation with Lopez in jail, which included claims regarding other past or future bad acts unconnected to the murder of Taylor, (3) the court prejudicially erred in failing to give accomplice testimony instructions as to Romero and De La Torre (and Sequen and Zolorza as well), and (4) the trial court should have instructed the jury on heat of passion manslaughter as a lesser included offense of the charged murder.

To these he adds another four arguments for reversal via supplemental briefing: (5) the prosecution improperly illustrated the beyond a reasonable doubt standard of proof during voir dire; (6) the trial court prejudicially erred in sustaining an objection to the cross-examination question asking whether De La Torre had been threatened with prosecution; (7) the trial court erred in sustaining objections to cross-examination questions posed to an investigating detective about whether certain of the statements defendant Paz made to Inmate Lopez were true; and (8) defendant Paz is entitled on direct appeal to relief afforded by Senate Bill 1437, which eliminates natural and probable consequences liability for murder. As we explain, none of these

eight arguments is convincing, but we do agree with defendant Paz, as does the Attorney General, that the trial court made a small error in calculating his concurrent sentence for the attempted animal cruelty conviction.

1

To assess defendant Paz's claim that the prosecution improperly described the concept of reasonable doubt during voir dire, some further recounting of what occurred at trial is necessary. We provide the pertinent background and then explain why defendant Paz's argument is forfeited and why his fallback ineffective assistance of counsel claim is meritless.

During voir dire, both the prosecution and the defense inquired about the prospective jurors' views on the beyond a reasonable doubt standard of proof. The defense, for instance, obtained a prospective juror's assent that the standard was "the highest burden in our constitution." The prosecution was intent on ensuring the jurors understood that beyond a reasonable doubt did not mean beyond "any bit of doubt" and that the jurors could use their common sense in deliberating.

In questioning two jurors (Prospective Juror 7322 and Prospective Juror 6379), the prosecutor sought to discern their views on the reasonable doubt standard by use of a hypothetical scenario. The prosecutor, a woman, asked Prospective Juror 7322 to assume that the reason the juror had been called to serve was to decide whether the prosecutor was a man or a woman using the standard of beyond a reasonable doubt. Noting the juror had "been here for a couple days" and "[h]ad an opportunity to see [the lawyers] get up, walk around, [and] talk," the prosecutor asked what the juror's verdict would be, explaining

she was "not afraid of the answer" and noting, "I have short hair, I get it." Prospective Juror 7322 responded, "You're a woman."

The prosecutor probed further, pointing out the juror had not seen her DNA, had not talked to her parents, and was unaware of whether she (the prosecutor) had given birth to kids. That led to the following colloquy:

> [The Prosecutor]: It's an example and I use it not to kind of liken it to the same decision and it's more light[-]hearted, obviously, than deciding if somebody is guilty of murder or not, but it's an example of how you use your common sense. Right. Your daily experience and the standard beyond a reasonable doubt.
>
> Do you need to see my [DNA] to be comfortable making that decision beyond a reasonable doubt if I'm a man or a woman?
>
> [Prospective Juror 7322]: Yes.
>
> [The Prosecutor]: You need to see [DNA]?
>
> [Prospective Juror 7322]: Yes.
>
> [The Prosecutor]: So I asked you a moment ago if you can—if you were asked to make a verdict?
>
> [Prospective Juror 7322]: Yes.
>
> [The Prosecutor]: Or to render a verdict beyond a reasonable doubt, can you say what you think, I'm a man or a woman? Or do you need more proof than what you have seen and what you have heard since you have been here in the last couple of days?
>
> [Prospective Juror 7322]: These days and times, yes, I need more proof.

[The Prosecutor]: Okay. All right. That's fine. That's why I ask the question. As an example of I only need to prove it to you beyond a reasonable doubt.

So you have a reasonable doubt as to whether or not I'm a woman? Like I said, I'm not offended. It's okay.

[Prospective Juror 7322]: Yes, I will say yes.

[The Prosecutor]: Okay. Fair enough. I don't have a problem with that answer.

The prosecutor later returned to the same hypothetical scenario with another of the prospective jurors, Prospective Juror 6379. The prosecutor said she was "marking [herself] as an exhibit" and explained: "Just like witnesses, you're going to listen to them talk, you're going to look at their mannerisms and decide if you think they are telling the truth or lying based on what you observe of the witnesses. Same thing that I'm asking you to do here. Your observations of me. [¶] Given the standard of beyond a reasonable doubt, using your common sense, can you render a verdict if I'm a man or a woman?" Prospective Juror 6379 responded that the prosecutor was a woman, and when the prosecutor asked whether the juror knew that beyond all possible doubt, the juror answered "no." The prosecutor asked if Prospective Juror 6379 needed to see her DNA to make a decision beyond a reasonable doubt and Prospective Juror 6379 said "no."

Defendant's trial attorney did not object to the prosecutor's use of the man-or-woman hypothetical scenario in exploring the jurors' views of reasonable doubt. Nor did counsel for defendant Montanez; he later returned to the point himself in voir dire, asking a prospective juror whether the juror agreed the

prosecutor's example was "a very extreme situation" (the prospective juror agreed) and ensuring the prospective juror understood the decision about what constitutes proof beyond a reasonable doubt was solely the prospective juror's to make (the prospective juror did). Neither Prospective Juror 7322 nor Prospective Juror 6379 was ultimately seated as a trial juror.

The absence of a contemporaneous objection to the prosecution's voir dire on reasonable doubt means defendant Paz's appellate contention on this score is forfeited. (*People v. Romero and Self* (2015) 62 Cal.4th 1, 24 ["As [the defendant] concedes, he did not object below on the ground the prosecutor's voir dire was racially biased and the claim is therefore forfeited"]; see also *People v. Winbush* (2017) 2 Cal.5th 402, 482.)

Anticipating the forfeiture, defendant Paz suggests his attorney's failure to object constitutes ineffective assistance of counsel. "'In assessing claims of ineffective assistance of trial counsel, we consider whether counsel's representation fell below an objective standard of reasonableness under prevailing professional norms and whether the defendant suffered prejudice to a reasonable probability, that is, a probability sufficient to undermine confidence in the outcome. (*Strickland v. Washington* (1984) 466 U.S. 668, 694[ ]; *People v. Ledesma* (1987) 43 Cal.3d 171, 217[ ].)'" (*People v. Carter* (2005) 36 Cal.4th 1114, 1189.)

Defendant Paz's ineffective assistance of counsel claim fails for two independent reasons. First, we do not believe the prosecutor mischaracterized the beyond a reasonable doubt standard, or characterized the standard at all. Rather, she posed a hypothetical scenario to discover the *jurors*' views on reasonable doubt and did not express a normative judgment on the views articulated. This is most clearly illustrated by the

prosecutor's response when Prospective Juror 7322 said DNA would be necessary to make a judgment beyond a reasonable doubt if the prosecutor was a man or a woman—the prosecutor responded: "Fair enough. I don't have a problem with that answer." Given the prosecutor's agnostic approach, defendant Paz's trial attorney could correctly decide an objection would be meritless, and "[f]ailure to raise a meritless objection is not ineffective assistance of counsel" (*People v. Bradley* (2012) 208 Cal.App.4th 64, 90). Second, Prospective Jurors 7322 and 6379 were never seated as trial jurors and there could accordingly be no conceivable prejudice to defendant Paz from the prosecution's voir dire. His contention that other seated jurors could have been influenced by the colloquy between the other two jurors is meritless speculation, both for the reasons we have already given and especially because the trial court itself correctly instructed the empanelled jury on reasonable doubt.

2

Like defendant Montanez, defendant Paz asserts it was error for the trial court not to give accomplice instructions sua sponte. We have already held this was error in reference to Romero, and we need not discuss defendant Paz's broader assertion of the argument as to others, including Zolorza, who was not even a trial witness. Rather, we hold the absence of such instructions was not prejudicial in light of the other evidence against defendant Paz at trial—particularly his own incriminating jail statements—that diminished the consequence of an absent instruction to view accomplice testimony with caution and supplied well more than necessary corroboration. (*Williams*, *supra*, 49 Cal.4th at p. 456; *People v. Williams*, *supra*,

16 Cal.4th at p. 680; cf. *Leach*, *supra*, 15 Cal.3d at p. 447 ["[H]owever, 'powerfully incriminating'" the wrongly admitted hearsay statements by a non-testifying declarant, they "pale[ ] dramatically in significance when compared with the tape recordings of [the defendant's] own admissions to the undercover deputy sheriff"].)

3

When De La Torre testified, he was impeached in several ways. He conceded he was a "heavy" methamphetamine user at the time of Taylor's murder. He conceded he was a gang member at the time. Certain of his assertions while testifying were shown to contradict statements he made during his recorded police interview. And most significant for our purposes, he admitted: he was present at the motor home on the day Taylor was killed; he knew, at the time of his police interview, the police had arrested him for Taylor's murder; the police told him he would be booked for murder (though he was not ultimately charged); and he was nervous during the interview that he would be charged for Taylor's death. Defendant Paz argues he is entitled to reversal because the trial court erred in sustaining a relevance objection to a single cross-examination on a slightly different point, one that asked whether the police told De La Torre he would be charged with murder "unless [he] gave [the police] the information they are seeking."

Although perhaps cumulative in light of all De La Torre's other admissions, we agree the question sought relevant information. (See, e.g., Evid. Code, § 210 ["'Relevant evidence' means evidence, including evidence relevant to the credibility of a witness or hearsay declarant, having any tendency in reason to

prove or disprove any disputed fact that is of consequence to the determination of the action"].) But we are confident trial court's ruling did not prejudice defendant Paz under any standard of assessing prejudice.

The information the objected-to question called for (whether the police explicitly threatened De La Torre with a murder prosecution unless he told them what they wanted to know) was at best marginally relevant in light of all that De La Torre had already admitted. He conceded that at the time of the interview he was nervous he would be charged with murder and he believed that was the reason he had been arrested. He also knew, and the police knew, he had been at the scene of the murder. On the testimony in evidence, any juror would have understood De La Torre had an incentive to ingratiate himself with the police to avoid a murder charge. Indeed, that is precisely what counsel for defendant Paz contended during closing argument, telling the jury—without objection—that De La Torre's testimony should be doubted because he made "statements while under the belief that he was going to be charged with murder."

In addition, the other evidence of defendant Paz's guilt was quite strong, especially his own self-incriminating statements preserved in the recorded conversation with inmate Lopez. (See, e.g., *People v. Baldwin* (2010) 189 Cal.App.4th 991, 1006 [evidence of the defendant's guilt was overwhelming, including "[f]irst and foremost," the recording of his conversations in a jail cell boasting about shooting the victim and discussing whether the police had found or could find incriminating evidence].) Furthermore, it is unlikely De La Torre would have answered the objected-to question affirmatively. The police interview with De

La Torre was recorded, and we can fairly infer the recording transcript (which the defense had) included no threat of the type presupposed by the cross-examination question at issue because the defense would have confronted De La Torre with it. It is possible, of course, that the police made such a threat before turning on the recording device, but the chance of that is low and the defense expressed no interest during trial in discovering what, if anything, transpired between De La Torre and the police before the recording started.

On this record, defendant Paz's right to a fair trial was not infringed and the trial court's relevance ruling did not contribute to the verdict obtained.[19]

4

Labeling the trial court's decision to prevent any reference to Lopez's status as an informant as "stunning," defendant Paz contends the trial court's ruling incorrectly excluded relevant evidence. On this record, however, the trial court's ruling was correct.

The fact that inmate Lopez was acting as an agent for the police was not relevant because the conversation was recorded. The relevant evidence for the jury's consideration was the

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[19] Defendant Paz theorizes prejudice can be inferred from the jury's second (not first) degree murder finding and its inability to reach a verdict on the arson charge. The premise of his theory—that the jury must have relied on a natural and probable consequences theory of murder to convict him and disbelieved the arson evidence—is faulty; the verdict is well explained as an act of lenity by the jury because they considered him the less culpable defendant on the evidence presented.

statements made by defendant Paz, and the jury heard those for itself without any testimonial filter. Lopez's motivations for asking the questions he did, and responding to defendant Paz's statements in the manner he did, were wholly immaterial; whether he conversed with defendant Paz at the police's behest or because he was bored and wanted someone to talk to, the result is the same. Defendant Paz made the incriminating statements with no trace of coercion and those were the statements that mattered to the jury's task.

5

Defendant Paz additionally attacks the ruling admitting his jail conversation with Lopez on the ground that he makes reference to several other bad acts he committed in the past or contemplated committing in the future. We need not analyze these seriatim for purposes of determining whether there was error because, even considered in the aggregate, we see no reasonable probability that the references to the other acts impacted the jury's verdict. (See *People v. Williams* (2017) 7 Cal.App.5th 644, 678 [any error in admitting Evidence Code section 1101, subdivision (b) evidence harmless where the other evidence of the charged crimes was strong].) In light of defendant Paz's own recorded statements taking pride in the commission of the rather gruesome charged murder—which were, of course, directly relevant—and the other evidence of guilt, we see no probability the jury would have instead rested its judgment on ancillary remarks concerning drug dealing, prison fights, or what defendant Paz might do if released.

In his jail cell conversation with inmate Lopez, defendant Paz made two statements his attorney sought to explore during the testimony of one of the investigating detectives, Detective Teryl Hubert.

As to the first, inmate Lopez asks defendant Paz if he has "been to the joint already," defendant Paz says yes, and then there is some attempt between the two to clarify whether inmate Lopez was referring to "[t]he pen." During cross-examination of Detective Hubert, counsel for defendant Paz confronted the detective with this portion of the jail cell conversation and asked, "In fact, [defendant Paz] has never been to the joint, correct?" The prosecution objected to "asking [the detective] to comment on what was being said" and the trial court sustained the objection.

As to the second statement, defendant Paz and inmate Lopez were discussing the charge he was facing for murdering Taylor and defendant Paz told inmate Lopez: "Yeah. Damn, fuck it. I'm just more worried about that warrant fool. [¶] . . . [¶] It's like, 'cause they got me for [drug] sales." On cross-examination of Detective Hubert, counsel for defendant Paz confirmed the detective recalled this portion of the recorded jail conversation and asked, "To your knowledge and based on your investigation, he had no warrant in his name; correct?" The prosecution objected, and the trial court sustained the objection.

Defense counsel then asked: "From your experience, isn't it true that in these jail systems oftentimes inmates lie to each other in order to gain respect or to bolster their reputation?" The prosecution again objected, and after a sidebar conference, the trial court permitted the defense to inquire as to whether "prisoners use puffery or lie or exaggerate . . . as long as it's not

specific to [defendant Paz]." In further cross-examination, Detective Hubert agreed she "imagine[d] that happens" when asked whether inmates in jail would lie to each other to gain respect and to "survive within the system."

Defendant Paz contends the objections sustained to these questions asked of detective Hubert deprived him of a "meaningful opportunity to present a complete defense," citing *Crane v. Kentucky* (1986) 476 U.S. 683, 690 (*Crane*). On the full trial record, there was no such deprivation because the trial court did not bar evidence on the thrust of the defense: that prisoners, and arguably defendant Paz, would make untrue statements to other prisoners to seem tough and gain respect. Detective Hubert ultimately conceded she imagined that happens among prisoners, and even more persuasively, counsel for defendant Paz called Romero (an inmate himself) as a defense witness and elicited testimony that jail inmates would lie to each other for their own safety or to look tough. The evidence admitted at trial permitted counsel for defendant Paz (without objection) to challenge the veracity or credibility of his recorded jail cell statement during closing argument, urging the jury to disregard defendant Paz's jail statements as "puffery, boasting and bragging, trying to survive, making sure everybody fears him." We believe this is the meaningful opportunity *Crane* and its progeny require. (*People v. Mickel* (2016) 2 Cal.5th 181, 218 ["'As a general matter, the ordinary rules of evidence do not impermissibly infringe on the accused's right to present a defense'"]; see also *People v. Mora and Rangel* (2018) 5 Cal.5th 442, 477.) Further, the evidence at trial establishes any curtailment of the defense was so marginal as to have been harmless beyond a reasonable doubt.

7

A defendant who kills in a sudden quarrel or heat of passion lacks the malice required for murder and therefore can be guilty of only voluntary manslaughter. (*People v. Breverman* (1998) 19 Cal.4th 142, 154.) This form of voluntary manslaughter is a lesser included offense of intentional murder. (*Ibid.*)

"A trial court has a sua sponte duty to instruct the jury on a lesser included uncharged offense if there is substantial evidence that would absolve the defendant from guilt of the greater, but not the lesser, offense. [Citation.] Substantial evidence is evidence from which a jury could conclude beyond a reasonable doubt that the lesser offense was committed. [Citations.] Speculative, minimal, or insubstantial evidence is insufficient to require an instruction on a lesser included offense. [Citations.]" (*People v. Simon* (2016) 1 Cal.5th 98, 132.) "[T]o warrant instructions on provocation and heat of passion, there must be substantial evidence in the trial record to support a finding that, at the time of the killing, defendant's reason was (1) actually obscured as a result of a strong passion; (2) the passion was provoked by the victim's conduct; and (3) the provocation was sufficient to cause an ordinary person of average disposition to act rashly or without due deliberation and reflection, and from this passion rather than from due deliberation or reflection." (*People v. Wright* (2015) 242 Cal.App.4th 1461, 1481.)

Contrary to defendant Paz's assertion, there is no such substantial evidence here, at least as to him. In his opening brief, he notes "homicide victim Taylor sexually harassed Montanez, offered her to another man for sexual purposes against her will, and then enlisted Cruz and others to

permanently surrender her home, the trailer which she shared with Taylor." Even assuming this could constitute sufficient provocation as to defendant Montanez, defendant Paz identifies no evidence about his relationship with her (or other facts) that would provide a sufficient link as to why these alleged provocations of her should count as provocations for him. Instead, he merely points to De La Torre's testimony (via his prior police interview) that everyone in the motor home "w[as] kind of getting pumped up on adrenaline as [defendant Montanez] was saying all this." That is not substantial evidence that defendant's Paz's reason was obscured as a result of a strong passion provoked by the victim's conduct—much less that an ordinary person of average disposition in his position would have killed rashly or without due deliberation.

8

Senate Bill 1437 was enacted to "amend the felony murder rule and the natural and probable consequences doctrine, as it relates to murder, to ensure that murder liability is not imposed on a person who is not the actual killer, did not act with the intent to kill, or was not a major participant in the underlying felony who acted with reckless indifference to human life." (Stats. 2018, ch. 1015, § 1, subd. (f).) Substantively, Senate Bill 1437 accomplishes this by amending Penal Code section 188, which defines malice, and section 189, which defines the degrees of murder and addresses liability for murder. It also adds section 1170.95 to the Penal Code, which allows those "convicted of felony murder or murder under a natural and probable consequences theory . . . [to] file a petition with the court that sentenced the petitioner to have the petitioner's murder

conviction vacated and to be resentenced on any remaining counts . . . ." (Pen. Code, § 1170.95, subd. (a).)

During closing argument, the prosecution chiefly contended defendant Paz was the actual killer and defendant Montanez was liable for the murder as an aider and abettor. As we have already noted, we adhere to our holding in *Martinez* that Senate Bill 1437's enactment of the petitioning procedure in section 1170.95 means the changes worked by the legislation do not apply retroactively on direct appeal. Defendant Paz is entitled to pursue the procedure set forth in section 1170.95, but he is not entitled to Senate Bill 1437 relief without doing so.

9

Defendant Paz and the Attorney General agree the trial court miscalculated the applicable sentencing range for defendant Paz's conviction by plea to attempted cruelty to an animal (Pen. Code, §§ 664, 597, subd. (a)), as charged in count 3. We agree there was a miscalculation because the charge was for attempt, not a completed crime, such that the applicable sentencing range was eight months, one year, or 18 months. (Pen. Code, § 664, subd. (a); see also Pen. Code, §§ 597, subd. (d), 1170, subd. (h).) The trial court imposed a low-term, consecutive sentence, and we shall modify the judgment to reflect the correct eight-month term on count 3.

DISPOSITION

The judgment as to defendant Paz is modified to impose an eight-month sentence on count 3, to run concurrent to the 15-years-to-life sentence imposed in connection with count 1. As so modified, the judgment is affirmed. The trial court shall deliver an amended abstract of judgment reflecting the modification to the Department of Corrections and Rehabilitation and correct the pertinent minute order.

The judgment as to defendant Montanez is reversed, and the matter is remanded for retrial, assuming the People so elect.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

BAKER, Acting P. J.

We concur:

MOOR, J.

KIM, J.